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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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JOEL DAVID KAUFMAN,

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Plaintiff,

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v.

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M. E. SPEARMAN, et al.,

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Defendants.

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Case No. [15-cv-02777-JD](#)

**ORDER GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

Re: Dkt. Nos. 69, 91, 92, 93, 95, 96, 99

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Joel David Kaufman, a state prisoner proceeding pro se, has sued under 42 U.S.C. § 1983. He alleges that defendants, Dr. Branch, Dr. Bright and Warden Spearman, were deliberately indifferent to his serious medical needs by not providing a special medical diet due to his food allergies. Plaintiff argues that his allergies to gluten, soy and dairy have resulted respiratory distress that causes vomiting, abdominal pain, itching, hives, psoriasis, bleeding and dizziness. He also alleges he was not receiving the minimal required calories from his meals. This case was referred to the Pro Se Prisoner Mediation Program but did not settle. Defendants filed a motion for summary judgment. Plaintiff filed an opposition, and defendants filed a reply. The motion is granted.

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BACKGROUND

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The following facts are largely undisputed:

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Prior to the events of the underlying complaint plaintiff was incarcerated in San Quentin State Prison and was receiving a gluten-free diet. Motion for Summary Judgment ("MSJ"), Mackie Decl. Ex. B. It was noted at a June 16, 2014 medical appointment at San Quentin State Prison that plaintiff was intolerant to gluten, a protein found in wheat, barley and rye, but had a

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1 negative biopsy for celiac disease, which is associated with gluten intolerance. *Id.*; Branch Decl. ¶
2 15.¹ San Quentin medical staff also noted that plaintiff had wanted to stop receiving the gluten-
3 free diet because it contained so many carbohydrates and it was difficult for him to feel full, but at
4 the June 16, 2014, appointment, he said that he wanted the gluten-free diet at lunch. Mackie Decl.
5 Ex. B. San Quentin medical staff told him that the food service program did not operate that way
6 and that plaintiff did not qualify for the gluten-free diet. *Id.*

7 Plaintiff was transferred to Correctional Training Facility (“CTF”) on September 10, 2014.
8 Docket No. 32 at 16. Defendant Spearman was the warden at CTF at the relevant time. MSJ
9 Spearman Decl. ¶ 1. Dr. Branch was plaintiff’s primary care physician at CTF and Dr. Bright was
10 CTF’s Chief Medical Executive and later Chief Physician and Surgeon. MSJ Branch Decl. ¶¶ 1,
11 4; Bright Decl. ¶ 1. Dr. Bright was Dr. Branch’s supervisor. Bright Decl. ¶ 5. Plaintiff indicated
12 to Dr. Branch that he suffered from food allergies and that gluten was a particular concern.
13 Branch Decl. ¶ 10. Dr. Branch reviewed plaintiff’s medical records and was unable to find a
14 record of tests to confirm plaintiff had the allergy. *Id.* ¶ 11. Dr. Branch decided to run tests to
15 confirm plaintiff’s assertion to ensure that she treated the correct condition. *Id.* ¶ 12.

16 On or about October 6, 2014, plaintiff’s father contacted the prison and stated that plaintiff
17 reported he had lost over twenty pounds since being incarcerated in May due to his allergies
18 preventing him from eating all of his meals. Docket No. 88 at 9. Warden Spearman responded to
19 plaintiff’s father, noting that plaintiff weighed 154 pounds on May 5, 2014, and 146 pounds on
20 September 23, 2014. *Id.* at 10. Plaintiff lost eight pounds over the course of four and a half
21 months, and his body mass was normal for his weight and height. *Id.* at 10-11, 18-19.

22 Dr. Branch researched the appropriate tests to detect an autoimmune response to gluten.
23 *Id.* ¶ 15. Dr. Branch ordered a tissue transglutaminase test (tTG) and an endomysial antibody test.
24 *Id.* The tests came back negative on December 31, 2014. *Id.* ¶¶ 16-18.

25 Plaintiff’s father sent a letter to Warden Spearman on January 30, 2015, stating that
26 plaintiff suffers from psoriasis that would be partially alleviated by lactase enzymes and that he

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28 ¹ Plaintiff states that he had a biopsy in 2011 to check for celiac disease, but it was negative.
Docket No. 86 at 11; Docket No. 88 at 18.

1 has food allergies. Docket No. 80 at 6-7. On February 5, 2015, Warden Spearman sent the letter
2 to Dr. Bright with a note to look into the concerns expressed about plaintiff's health. *Id.* at 4-5.
3 Dr. Branch ordered tests for allergies to egg white, cow's milk, wheat, rye, barley, oat, peanut,
4 soybean, egg yolk, cheddar cheese, cheese mold, and cocoa. Branch Decl. ¶ 19. On March 23,
5 2015, those tests also came back negative. *Id.* Based on the results of all the tests, Dr. Branch
6 determined that plaintiff did not suffer from food allergies and the foods she tested were not the
7 cause of his symptoms. *Id.* ¶ 20.

8 Dr. Branch continued to treat plaintiff's other complaints and discussed his food reactions.
9 *Id.* ¶ 23. Dr. Branch ordered additional allergy tests for soybean, white bean and lentils, which, on
10 March 13, 2016, also came back negative. *Id.* ¶ 24.

11 Plaintiff suffers from urticaria, a skin reaction, and Dr. Branch hoped to discover whether
12 allergens were causing the symptoms. *Id.* ¶ 25. Dr. Branch referred plaintiff to nondefendant Dr.
13 Abernathy, an outside allergist and immunologist. *Id.* Dr. Abernathy first met plaintiff on May 3,
14 2016. Branch Decl. Ex. E. Plaintiff told Dr. Abernathy that he was diagnosed as having a gluten
15 sensitivity and being lactose deficient. *Id.* At that appointment, Dr. Abernathy stated that plaintiff
16 should be skin tested for allergies in the future. *Id.* Dr. Abernathy also stated that with respect to
17 food allergies:

- 18 - Gluten intolerance, presumably either he's had a biopsy
19 illustrating the problem gatroenterologically or he's had the
20 serologies for gluten sensitivity gliadin and gluten being
positive. I think that the rash is a consequence of the gluten
sensitivity and has its diagnosis of dermatitis herpetiformis.
21 - Milk intolerance as he is lactose deficient.

22 *Id.*

23 Dr. Branch reviewed plaintiff's canteen purchases to learn what he was consuming outside
24 of prison meals. *Id.* ¶ 27. Plaintiff told Dr. Branch that through experimentation he learned he
25 could tolerate sharp cheddar cheese, corn tortilla, roasted peanuts, beef stew, Snickers, Nestle
26 Crunch, barbecue-flavored chips, corn chips, tortilla chips and packaged dry salami. *Id.* Plaintiff
27 stated he could not tolerate ramen noodles, milkshakes, ice cream and sour cream. *Id.* ¶ 28. Based
28 on this information, Dr. Branch did not change her opinion that plaintiff did not require a special

1 diet. *Id.*

2 On July 7, 2016, plaintiff was seen again by Dr. Abernathy who conducted a skin test.
3 Branch Decl. Ex. F. The skin test showed that plaintiff was allergic to shellfish and almonds
4 which he stated he did not have an opportunity to eat. *Id.* Plaintiff also tested negative for a
5 gluten allergy, with Dr. Abernathy stating, “[t]he sensitivity to gluten at least is ruled out on an
6 IgE basis and I believe you have IgG RAST test to gluten. If they’re negative, then gluten should
7 not be a problem.” *Id.* Dr. Abernathy spoke with Dr. Branch and told her that he suspected
8 plaintiff’s urticaria was caused by environmental allergens and pollen. *Id.*; Branch Decl. ¶ 30. Dr.
9 Branch again concluded that plaintiff did not need a special diet. Branch Decl. ¶ 29.

10 Dr. Bright had multiple discussions with Dr. Branch regarding plaintiff and met with
11 plaintiff to discuss his psoriasis treatment. Bright Decl. ¶¶ 7-8. Dr. Bright approved of plaintiff’s
12 medical treatment. *Id.* ¶ 9. Based on all the test results and treatment, Dr. Bright did not believe
13 that plaintiff’s symptoms were caused by food and that environmental allergies could be
14 responsible. *Id.* ¶ 11. Dr. Bright did not believe that a special diet was medically indicated for
15 plaintiff. *Id.* ¶ 12.

16 Plaintiff suffered allergic reactions resulting in skin rashes on several occasions while at
17 San Quentin State Prison, and he received medical help. Docket No. 86 at 131-140. These
18 occurred on or about May 5, 2014, May 13, 2014 and July 28, 2014. *Id.* Plaintiff suffered
19 additional reactions on September 15, 2014 and July 26, 2016, at CTF and was treated by medical
20 staff. *Id.* at 152. Plaintiff has jail and prison admission documents that state that he had celiac
21 disease Docket No. 86 at 166-67, 169. Dr. Branch failed to provide lactose enzymes. Docket No.
22 85 at 6.

23 In response to a letter from plaintiff, Dr. Abernathy advised him in a letter dated
24 September 19, 2016, that skin tests against foods are not always 100% accurate. Docket No. 86 at
25 107. He stated that there can be false positives and false negatives. *Id.* In response to another
26 letter, Dr. Abernathy explained to plaintiff in a letter dated May 15, 2017, that the blood tests for
27 gluten are accurate and specific but not totally sensitive. *Id.* at 108.

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2 **LEGAL STANDARD**

3 Summary judgment is proper where the pleadings, discovery, and affidavits show there is
4 “no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of
5 law.” *See Fed. R. Civ. P. 56(a)*. Material facts are those that may affect the outcome of the case.
6 *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is
7 genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving
8 party. *See id.*

9 A court shall grant summary judgment “against a party who fails to make a showing
10 sufficient to establish the existence of an element essential to that party’s case, and on which that
11 party will bear the burden of proof at trial[,] . . . since a complete failure of proof concerning an
12 essential element of the nonmoving party’s case necessarily renders all other facts immaterial.”
13 *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The moving party bears the initial
14 burden of identifying those portions of the record that demonstrate the absence of a genuine issue
15 of material fact. *Id.* The burden then shifts to the nonmoving party to “go beyond the pleadings
16 and by [his] own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on
17 file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” *See id.* at 324
18 (citing *Fed. R. Civ. P. 56(e)* (amended 2010)).

19 For purposes of summary judgment, the Court must view the evidence in the light most
20 favorable to the nonmoving party; if the evidence produced by the moving party conflicts with
21 evidence produced by the nonmoving party, the court must assume the truth of the evidence
22 submitted by the nonmoving party. *See Leslie v. Grupo ICA*, 198 F.3d 1152, 1158 (9th Cir. 1999).
23 The Court’s function on a summary judgment motion is not to make credibility determinations or
24 weigh conflicting evidence with respect to a disputed material fact. *See T.W. Elec. Serv., Inc. v.*
25 *Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

26 Deliberate indifference to serious medical needs violates the Eighth Amendment’s
27 proscription against cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976);
28 *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other grounds*, WMX

1 *Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). A determination of
2 “deliberate indifference” involves an examination of two elements: the seriousness of the
3 prisoner’s medical need and the nature of the defendant’s response to that need. *Id.* at 1059.

4 A serious medical need exists if the failure to treat a prisoner’s condition could result in
5 further significant injury or the “unnecessary and wanton infliction of pain.” *Id.* The existence of
6 an injury that a reasonable doctor or patient would find important and worthy of comment or
7 treatment, the presence of a medical condition that significantly affects an individual’s daily
8 activities, or the existence of chronic and substantial pain are examples of indications that a
9 prisoner has a serious need for medical treatment. *Id.* at 1059-60.

10 A prison official is deliberately indifferent if he or she knows that a prisoner faces a
11 substantial risk of serious harm and disregards that risk by failing to take reasonable steps to abate
12 it. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). The prison official must not only “be aware of
13 facts from which the inference could be drawn that a substantial risk of serious harm exists,” but
14 “must also draw the inference.” *Id.* If a prison official should have been aware of the risk, but did
15 not actually know, the official has not violated the Eighth Amendment, no matter how severe the
16 risk. *Gibson v. County of Washoe*, 290 F.3d 1175, 1188 (9th Cir. 2002). “A difference of opinion
17 between a prisoner-patient and prison medical authorities regarding treatment does not give rise to
18 a § 1983 claim.” *Franklin v. Oregon*, 662 F.2d 1337, 1344 (9th Cir. 1981). In addition “mere
19 delay of surgery, without more, is insufficient to state a claim of deliberate medical indifference. .
20 . . [Prisoner] would have . . . no claim for deliberate medical indifference unless the denial was
21 harmful.” *Shapley v. Nev. Bd. of State Prison Comm’rs*, 766 F.2d 404, 407 (9th Cir. 1985).

22 Adequate food is a basic human need protected by the Eighth Amendment. See *Keenan v.*
23 *Hall*, 83 F.3d 1083, 1091 (9th Cir. 1996), *amended*, 135 F.3d 1318 (9th Cir. 1998). The Eighth
24 Amendment right to food was clearly established as of at least 2001. *Foster v. Runnels*, 554 F.3d
25 807, 815 (9th Cir. 2009). Denial of food service presents a sufficiently serious condition to meet
26 the objective prong of the Eighth Amendment deliberate indifference analysis. *Id.* at 812-13; *see,*
27 *e.g.*, *id.* (denial of 16 meals over 23 days was “a sufficiently serious deprivation because food is
28 one of life’s basic necessities”); *id.* at 812 n.1 (denial of 2 meals over 9-week period was not

1 sufficiently serious to meet objective prong of Eighth Amendment deliberate indifference). The
2 Eighth Amendment requires only that prisoners receive food that is adequate to maintain health; it
3 need not be tasty or aesthetically pleasing. *See Graves v. Arpaio*, 623 F.3d 1043, 1050 (9th Cir.
4 2010) (per curiam) (Eighth Amendment requires that pretrial detainees be given food that meets or
5 exceeds the U.S. Department of Agriculture's Dietary Guidelines).

6 **DISCUSSION**

7 Plaintiff argues that defendants were deliberately indifferent in failing to take his food
8 allergies seriously, for failing to provide proper treatment and for not providing a special diet.
9 Defendants counter that they thoroughly investigated plaintiff's complaints and determined that
10 plaintiff did not need a special diet or additional treatment than what they provided. Defendants
11 point to the myriad of tests they administered, which came back negative, and their referral of
12 plaintiff to the outside allergist and immunologist. All of the doctors concluded that plaintiff's
13 symptoms were not caused by food allergies and that it was more likely caused by environmental
14 allergens and pollen. Defendants have met their burden in showing that there is no genuine
15 dispute as to any material fact and they are entitled to judgment as a matter of law. Plaintiff has
16 failed to meet his burden in showing that there is a genuine issue for trial.

17 Plaintiff arrived at CTF in September 2014 and informed medical staff that he had a gluten
18 allergy and several other food allergies. It is undisputed that plaintiff had a biopsy in 2011 to
19 check for celiac disease, which is associated with a gluten allergy, and that plaintiff tested
20 negative. It is also undisputed that plaintiff attempted to stop the gluten-free diet when he was
21 receiving it at San Quentin State Prison.

22 In response to plaintiff's statements and concerns, Dr. Branch reviewed plaintiff's medical
23 records but was unable to find any tests that confirmed plaintiff's beliefs regarding the allergies.
24 Dr. Branch ordered two different tests for a gluten allergy, both of which came back negative. In
25 response to plaintiff's additional complaints, Dr. Branch ordered further tests for egg white, cow's
26 milk, wheat, rye, barley, oat, peanut, soybean, egg yolk, cheddar cheese, cheese mold, cocoa,
27 soybean, white bean and lentils. All of these tests also came back negative for allergies.

28 To treat plaintiff for his urticaria skin reaction and possible food allergies, Dr. Branch sent,

1 and Dr. Bright approved, plaintiff's referral to an outside allergist and immunologist. After
2 multiple meetings, the outside doctor conducted skin tests and concluded that plaintiff did not
3 have a gluten allergy but was allergic to shellfish and almonds. It is undisputed that plaintiff does
4 not eat these foods in prison. The outside doctor ruled out sensitivity to gluten and believed that
5 the urticaria was caused by environmental allergens. In light of all the tests performed at CTF and
6 with the outside doctor ruling out the gluten allergy, defendants concluded that plaintiff still did
7 not require a special diet.

8 Defendants' determination does not demonstrate deliberate indifference because of the
9 extensive medical testing and care employed to reach that decision. While plaintiff has a
10 difference of opinion and believes he does have a gluten allergy and requires a special diet, “[a]
11 difference of opinion between a prisoner-patient and prison medical authorities regarding
12 treatment does not give rise to a § 1983 claim.” *Franklin*, 662 F.2d at 1344. Even if certain
13 doctors who previously treated plaintiff stated he was allergic to gluten, defendants are still
14 entitled to summary judgment. There were no test results in plaintiff’s prison medical history that
15 identified a gluten allergy, and the biopsy conducted in 2011 was negative.

16 Plaintiff argues that it is possible that all of the tests were incorrect and it is possible that
17 he is allergic to gluten. While both of these premises are possible, plaintiff cannot rely on
18 possibilities to meet the high standard of deliberate indifference. Defendants relied on multiple,
19 different medical tests that are the standard diagnostic tests for food allergies. That these tests
20 could only possibly be wrong does not demonstrate a constitutional violation.

21 There are references in various filings that plaintiff may have lost twenty pounds of weight
22 during the first four and half months of his incarceration due to being unable to eat the prison food
23 provided. It is undisputed that when Warden Spearman received this information in a letter from
24 plaintiff’s father, Warden Spearman contacted prison medical officials to investigate. It is also
25 undisputed that the medical records reflect that plaintiff lost eight pounds over the four and a half
26 month period that his body mass was normal for his weight and height. Defendants are entitled to
27 summary judgment with respect to any claim that plaintiff was denied food adequate to maintain
28 his health. Similarly, defendants are entitled to summary judgment with respect to any claim that

1 they were deliberately indifferent for failing to provide lactose enzymes. It is undisputed that
2 while plaintiff was not able to consume ice cream, milkshakes or sour cream, he was able to eat
3 cheese. Defendants provided plaintiff with sufficient nutrition and he has not shown that their
4 denial of lactose enzymes violated the Eighth Amendment.

5 Plaintiff also notes that he suffered many allergic reactions during his time in prison. Most
6 of these occurred while he was in San Quentin State Prison and did not involve defendants.
7 Plaintiff was provided treatment after the few episodes of allergic reactions he suffered while at
8 CTF. To the extent plaintiff wanted to be provided a different injection than what was provided,
9 this fails to demonstrate an Eighth Amendment violation.

10 The undisputed evidence demonstrates that defendants provided an acceptable level of care
11 with the diagnostic testing, outside referrals and other treatment provided for plaintiff's allergic
12 reactions. While plaintiff disagrees with defendants' medical opinion and the diagnostic results,
13 this fails to present a constitutional violation, and defendants are entitled to summary judgment.

14 **Qualified Immunity**

15 The defense of qualified immunity protects "government officials . . . from liability for
16 civil damages insofar as their conduct does not violate clearly established statutory or
17 constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457
18 U.S. 800, 818 (1982). The rule of "qualified immunity protects 'all but the plainly incompetent or
19 those who knowingly violate the law.'" *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (quoting
20 *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Defendants can have a reasonable, but mistaken,
21 belief about the facts or about what the law requires in any given situation. *Id.* at 205. A court
22 considering a claim of qualified immunity must determine whether the plaintiff has alleged the
23 deprivation of an actual constitutional right and whether such right was clearly established such
24 that it would be clear to a reasonable officer that his conduct was unlawful in the situation he
25 confronted. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (overruling the sequence of the
26 two-part test that required determining a deprivation first and then deciding whether such right
27 was clearly established, as required by *Saucier*). The Court may exercise its discretion in deciding
28 which prong to address first, in light of the particular circumstances of each case. *Pearson*, 555

1 U.S. at 236.

2 Even if the Court were to find that defendants had deprived plaintiff of a constitutional
3 right, they would still be entitled to qualified immunity. The record demonstrates that numerous
4 diagnostic tests were employed to determine if plaintiff suffered from food allergies and if they
5 were the cause of his symptoms and that plaintiff was referred to an outside doctor, who agreed
6 with the course of treatment by defendants. It would not be clear to a reasonable official or doctor
7 that following the results of the various medical tests and the outside doctor's opinion would be
8 unlawful.

9 **CONCLUSION**

- 10 1. Defendants' motion for summary judgment (Docket No. 69) is **GRANTED**.
11 2. Defendants motion for an extension of time to file a reply to plaintiff's default judgment
12 motion (Docket No. 96) is **GRANTED**. Plaintiff's motions for default judgment and damages
13 (Docket Nos. 95, 99) are **DENIED** as meritless.
14 3. Plaintiff's motions to enforce subpoenas (Docket Nos. 91, 92, 93) are **DENIED** as moot
15 because summary judgment is granted and the subject matter of the subpoenas was not relevant to
16 the claims in this action.
17 4. The stay in this case (Docket No. 21) is **LIFTED**. The Clerk shall terminate all
18 pending motions, enter judgment, and close the file

19 **IT IS SO ORDERED.**

20 Dated: January 16, 2018

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JAMES DONATO
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOEL DAVID KAUFMAN,
Plaintiff.

V.

M. E. SPEARMAN, et al.,
Defendants.

Case No. 15-cv-02777-JD

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on January 16, 2018, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Joel David Kaufman
AT3133
P.O. Box 705
Soledad, CA 93960

Dated: January 16, 2018

Susan Y. Soong
Clerk, United States District Court

By: Lisa R. Clark
LISA R. CLARK, Deputy Clerk to the
Honorable JAMES DONATO